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No. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DAVID E. KENEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF THE COUNTY OF MONROE, NEW YORK

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BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

About 8:00 P. M. on the 25th day of April, 1963, two female police officers entered petitioner's place of business in the City of Rochester, New York. The police officers testified that, on a previous occasion, petitioner told them of a shipment, including "hot books" or "spicy books" would be coming in (R. 8, 69); that, on the date in question, petitioner indicated to the officers the books he had previously referred to; that he said they were "hot

books", "spicy, hot" (R. 10, 11, 70, 71); that, from the books indicated, the officers chose and purchased three novels entitled "Lust School", "Lust Web" and "Sin Servant".

Petitioner testified he put the books out for sale without reading them or knowing anything about them (R. 85-86), but on cross-examination he stated that he knew generally what was in "Midnight" and "Nightstand" books (R. 92).

The stories in the three books at bar are very similar, even to the number of pages in each story, which number is 190. They are filled with graphic descriptions of immoral sexual acts and conduct, both heterosexual and homosexual. Although certain four-letter words are omitted, there can be no doubt of what is being portrayed. In each, the plot, if any, is subordinate to the theme of sexual misconduct. There is no literary merit in any of these books, and in each a somewhat "happy conclusion" is used to excuse or forgive the wantonness preceding it.

The trial jury found petitioner guilty (R. 122) of selling obscene books in violation of Section 1141 of the Penal Law of the State of New York. Petitioner was fined $500 and sentenced to a term of four months in the Monroe County Penitentiary.

Upon appeal to the Monroe County Court the conviction was affirmed. Application was made to Hon. Charles S. Desmond, Chief Judge of the Court of Appeals of the State of New York, for leave to appeal to that court, which was denied.

Argument

1. The Decision Below That the Instructions of the Trial Court to the Jury on Determination of Obscenity Fairly State the Applicable Law, When Considered in Their Entirety, are not in Direct Conflict With the Rulings of This Court or With the Decision in Volanski v. United States, 246 F. 2d 842.

In *Roth v. United States,* 354 U. S. 476, 489, this Court adopted as a standard of obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The trial judge did not direct that obscenity be determined by the appeal of the books to "sex perverted" individuals. The trial judge did say that "Obscene material is material which deals with sex in a manner appealing to the prurient interests of individuals, that is, those who may be sex perverted. . . ." (R. 108). The judge went on to describe obscene material as "the work has no other purpose except to insight and excite the interests of individuals who are already perverted to future acts of perversion." (R. 109).

The latter statement goes beyond the rule of *Roth* and is stricter, for nowhere in *Roth* is there stated any necessity to show inciting to future acts of perversion.

However, petitioner's trial counsel made a request of the trial judge in these words:

> "And I request the Court to further charge the jury that the finding of obscenity, if any, must be made on their finding from the facts in evidence; that the dominant effect of the book as a whole, has as its main purpose to stimulate sexual feelings and

> acts upon reasonable adults in the community, not young persons, or sensualists, or libertines, and that this standard must be determined not on any individual judge's or juror's standards, but on the basis of contemporary standards." (R. 121).

to which the judge replied, "In total you took some exception, but I did charge just what you are talking about." (R. 121). This response to the request to charge amounted to saying that the request was the charge of the court, thus bringing the matter within the bounds of *Roth*.

2. The Decision Below does not Raise any Significant Question as to the Constitutionally Required Degree of Scienter.

In this case the petitioner testified that he put the books in question out for sale without reading them or knowing anything about them (R. 85-86), but on cross-examination he stated that he knew generally what was in "Midnight" and "Nightstand" books (R. 92), the names "Midnight" and "Nightstand" referring to lines of books (R. 84, 90), other books of which lines he had read (R. 92).

The police officers testified that, on a previous occasion, petitioner told them a shipment, including "hot books" or "spicy books" would be coming in (R. 8, 69); that, on the date in question, petitioner indicated to the officers the books he had previously referred to and said they were "hot books", "spicy, hot" (R. 10, 11, 70, 71); that the books in question were picked from those indicated (R. 11).

It is readily apparent that the inference of knowledge was based on evidence considerably more substantial than a lurid title or a lurid cover drawing.

In *Smith v. California*, 361 U. S. 147, 154, it is said that:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in

> proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

and, in a concurring opinion, Mr. Justice Frankfurter said, at page 164:

> "A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or in any true sense, having knowledge of the book."

Certainly the law does not contemplate that a bookseller can insulate himself by the simple expedient of avoiding reading a certain book where, as here, he admits to knowledge of lines or types of books, which include the book or books in question.

3. The Decision Below does not Raise Anew an Unresolved Constitutional Question as to "Contemporary Community Standards".

In *Roth v. United States,* 354 U. S. 476, 489, this Court adopted, as to obscenity, the test of "whether to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest."

The word "community" is a broad term capable of many uses and meanings, for instance, "community property", "community of interest", "the world community", "the theater-going community", etc. It is apparent, then, that in each use of the word is involved something in common to two or more persons.

In "Webster's New Twentieth Century Dictionary", 2nd edition, (1960) there appears the following under "community":

"6. the people living in the same district, city, etc. under the same laws.

"7. the district, city, etc. where they live."

In Roth it is the "average person" we are concerned with, not the cosmopolite. In *Volanski v. United States*, 246 F. 2d 842, 845, is said:

> "* * * The problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury * * *, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community."

The duty being imposed upon a jury to determine the question of obscenity, the jury will determine the question within the bounds of the understanding, experience and knowledge of its members, normally based upon the local community as is that of the average person. This will, no doubt, result in some slight variation, for not all local communities will deem the same things obscene. This is not repugnant to contemplate, for not all local statutes on the subject need be identical to be constitutional. And, if there is but one national community standard, then *Roth* need not have referred to "standards" unless it meant to encompass under one general rule the varying standards of local communities.

There are countless fields in this country where standards differ from one local community to another by reason of existing laws and customs. If they are not repugnant, why, then, should varying standards of obscenity be so considered?

The trial judge did not ask the jury to *create* rather than *reflect* the community standard when he said the jury

was to determine "the standards in which you feel this community is entitled to." It is clear from the charge that the jury was to make its determination on the basis of the existing community standard of Rochester, New York. The trial judge instructed the jury to *define* the standard, not to *create* it.

4. The Decision Below does not Raise Important Constitutional Questions as to the Proper Test of Obscenity in Literature.

The decision of the Monroe County Court held that the instructions given to the jury in this case by the trial judge "fairly state the applicable law, when considered in their entirety." The test the jury was to apply under the instructions of the trial judge was the test of standard laid down in the *Roth* case, 354 U. S. at 489.

The Monroe County Court went on to describe the books in this case as "hard-core pornography", which seems to be a standard stricter than that of the *Roth* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Monroe County Court should be denied.

Respectfully submitted,

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